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In the
Supreme Court of the United States

JOSE ANTONIO RODRIGUEZ,
Petitioner,

v.

FEDEX FREIGHT EAST, INCORPORATED,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

D. RICK MARTIN
Counsel of Record
GLOTTA & ASSOCIATES
220 Bagley, Suite 808
Detroit, MI 48226
313-963-1320
drmartin@glottaassociates.com

Counsel for Petitioner

April 5, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

Whether petitioner's right to a fair trial by impartial jurors was impaired by the district court's refusal to give a jointly requested instruction that specifically prohibited the jurors from using the Internet for any purposes regarding the case, where the district court did not give the parties an opportunity to object, and where the district court knew that case-related information was accessible to the jurors on the Internet, including the prior district court's decision dismissing petitioner's case and the Sixth Circuit's decision affirming the dismissal of claims, save, the failure to promote claim?

Whether petitioner was denied due process by the district court's refusal to conduct an evidentiary hearing to (1) determine whether the integrity of the verdict was tainted by a juror who obtained case-related information on the Internet and (2) allow petitioner an opportunity to demonstrate that he was denied a fair trial by impartial jury?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES vi

PETITION FOR WRIT OF CERTIORARI 1

INTRODUCTION 1

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF CASE 3

REASONS FOR GRANTING THE WRIT 19

I. THE RAPID DEVELOPMENT OF TECHNOLOGY HAS PLACED IN THE HANDS OF EVERY JUROR THE CAPABILITY TO (1) OBTAIN EXTRANEOUS INFORMATION REGARDING A PARTY, WITNESS, LAWYER OR THE JUDGE (2) OBTAIN EXTRANEOUS INFORMATION CONCERNING THE FACTS IN THE CASE ITSELF, INCLUDING PREVIOUS OPINIONS AND COURT OF APPEALS DECISIONS; (3) OBTAIN OTHER LAWSUITS FILED AGAINST CORPORATE DEFENDANTS; (4) OBTAIN "LEGAL" DEFINITIONS AND STATUTES; (5) OBTAIN CRIMINAL BACKGROUND

HISTORY; (6) OBTAIN YOUTUBE VIDEOS, PHOTOGRAHS, VIDEO DISCOVERY DEPOSITIONS, GOOGLE EARTH MAPS; AND (7) "TEXT" THE EXTRANEOUS INFORMATION TO OTHER JURORS EVEN WHILE SITTING IN THE JURY BOX. THE INTERNET-JUROR'S ABILITY TO WREAK HAVOC ON THE JURY TRIAL SYSTEM PRESENTS A QUESTION OF SUCH EXCEPTIONAL IMPORTANCE TO THE PUBLIC'S CONFIDENCE IN THE JURY SYSTEM THAT THE COURT CANNOT WAIT FOR A *SPLIT IN THE CIRCUITS* --WHICH MAY TAKE YEARS—AS THE NUMBER OF "GOOGLE MISTRIALS"—CONTINUE TO GROW 22

II. AN INSTRUCTION SPECIFICALLY PROHIBITING JURORS ACCESSING THE INTERNET IS NECESSARY TO PROTECT WITNESSES WHO MAY BE RELUCTANT TO TESTIFY OUT OF CONCERN THAT JURORS MAY TRY TO FIND THEM ON FACEBOOK OR TWITTER OR OTHER SOCIAL NETWORKING SITES 35

III. THE DISTRICT COURT'S REFUSAL TO CONDUCT A POST-TRIAL HEARING TO (1) DETERMINE WHETHER THE CASE-RELATED INFORMATION ACCESSED ON THE INTERNET BY JUROR #4 TAINTED THE VERDICT AND (2) GIVE PETITIONER AN OPPORTUNITY TO DEMONSTRATE THAT THE EXTRANEOUS INFORMATION DEPRIVED PETITIONER OF THE RIGHT TO A FAIR TRIAL BY IMPARTIAL JURORS . . . 38

IV. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTION PRESENTED 40

CONCLUSION 42

APPENDIX

Appendix A: Decision, United States Court of Appeals for the Sixth Circuit (November 15, 2010) 1a

Appendix B: Order Denying Plaintiff's Motion for Reconsideration #63, United States District Court, Eastern District of Michigan, Southern Division (September 17, 2008) 5a

Appendix C: Order Denying Plaintiff's Motion for Judgment Notwithstanding the Verdict or a Mistrial or a New Trial (#48), and Denying Defendant's Motion to Strike Remarks (#55), United States District Court, Eastern District of Michigan, Southern Division (September 5, 2008) 9a

Appendix D: Judgment for Defendant, Jury Verdict, United States District Court, Eastern District of Michigan, Southern Division (June 27, 2008) 37a

Appendix E: Order denying rehearing, United States Court of Appeals for the Sixth Circuit (January 5, 2011) 39a

TABLE OF AUTHORITIES

Cases

City of Ontario, California, et. al. v. Quon et. al.,
560 U.S.___ (2010) 9, 34

In re Rodriguez v. FedEx Freight East, Inc.,
487 F.3d 1001 (6th Cir. 2007) 12

Kiernan v. Van Schraik,
347 F.2d 775 (3d Cir. 1965) 38

Krause v. Rhodes,
570 F.2d 563 (6th Cir. 1977) 39

Mattox v. United States,
146 U.S. 140 (1892) 39

McCoy v. Goldston,
652 F.2d 654 (6th Cir. 1981) 38, 39

McDonough Power Equipment v. Greenwood,
464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 683
(1984) 3, 39

Nevers v. Killinger,
169 F.3d 352 (6th Cir. 1999) 39

Smith v. Phillips,
455 U.S. 209 (1982) 3, 39

Stiles v. Lawrie,
211 F.2d 188 (6th Cir. 1954) 39

Wellons v. Hall,
588 U.S. ___ (2010) 39

Constitution

U.S. Const. amend. V 2

U.S. Const. amend. VI 2, 3

U.S. Const. amend. VII 3

Statutes

28 U.S. § 1254(1) 2

Mich. Comp. Laws §§ 37.2101 et seq. 11

Rules

Fed. R. Civ. P. Rule 51(b)(1)(2) 14

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and Case Mgmt. to Judges, United States Circuit Courts (January 28, 2010) *available at* http://www.judges.org/pdf/jury-instructions-cip10.pdf. 37

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Websites

www.facebook.com 26

www.linkedin.com 28

www.myspace.com 28

www.twitter.com 28

PETITION FOR WRIT OF CERTIORARI

Petitioner Jose Antonio Rodriguez respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on November 15, 2010.

INTRODUCTION

This case, presents troubling *undisputed* facts that raise serious questions concerning the conduct of the trial, and whether the court of appeals "carefully reviewed" those undisputed facts before addressing petitioner's constitutional claim of being denied his right to a fair trial by *impartial* jurors. Although the trial looked typical, at least one juror was engaged in inappropriate *Internet-related misconduct* behind the scenes. Only after the trial did petitioner's counsel learn that a juror used the *Internet* to "read all about the attorneys in the case". Neither petitioner nor any court has ascertained precisely what the miscreant juror "read"; and whether it included *prior* court decisions, including the district court decision dismissing *all* of petitioner's claims and the Sixth Circuit's decision in *Rodriguez v. FedEx Freight East, Inc.*, 487 F.3d 1001 (6th Cir. 2007) *(Rodriguez I)*, affirming the dismissal of all claims, save the one claim that was remanded and tried. Although most likely the juror used the Internet to enhance his power position within the jury, petitioner was not able to determine what prompted Juror #4 to go on the Internet and read about the attorneys in the case.

OPINIONS BELOW

The November 15, 2010, opinion of the court of appeals is unreported (Slip Copy, 2010 WL 4721152 (6th Cir.)), and is set out at pp. 1a-4a of the Appendix. The January 5, 2011, order of the court of appeals denying rehearing which is not officially reported, is set out at pp. 39a-40a of the Appendix. The September 5, 2008 opinion of the district court, which is not officially reported, is set out at pp. 9a-36a of the Appendix. The September 17, 2008 order denying reconsideration of the district court, which is not officially reported, is set out at pp. 5a-8a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on November 15, 2010. A timely petition for rehearing en banc was denied on January 5, 2011. The Court has jurisdiction pursuant to 28 U.S. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a . . . pubic trial by an impartial jury."

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF CASE

The issues in this petition arise from the district court's refusal to give a *jointly* requested instruction that *specifically* prohibited the jurors from using the Internet *for any purposes* regarding the case. The district court did not even give the parties an opportunity to object. In addition, the district judge refused to conduct a post-verdict hearing. The fact is that a juror used the Internet. A hearing would have established that he used that extraneous information to deny petitioner a fair trial.

In other words, the district judge denied an instruction relative to use of the Internet and then compounded the error by denying a hearing relative to the effect of using the Internet.

The Sixth Amendment to the U.S. Constitution states in part, that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial jury* of the state and district wherein the crime shall have been committed." (emphasis added) The civil litigant's right to an impartial jury inheres in the Seventh Amendment's preservation of a "right to trial by jury" and the Fifth Amendment's guarantee of due process. An impartial jury is one capable and willing to decide the case solely on the evidence before it. *Smith v. Phillips*, 455 U.S. 209, 217 (1982) Because an impartial jury is obviously the touchstone of a fair trial, *McDonough Power Equipment v. Greenwood*, 464 U.S. 548, 554, 104 S.Ct. 845; 849, 78 L.Ed.2d 683 (1984) courts throughout modern history have labored to safeguard sitting jurors from extraneous information.

There is a fundamental contradiction between the concept of a fair trial, arduously developed over the last 300 years, and the rapid development of Internet technology over the last 10 years. A fair trial, if it involves nothing else, requires that the jury consider and evaluate only that evidence admitted in Court, and only witnesses subjected to cross examination. By contrast, the Internet provides access to a vast amount of information much of which is neither reliable nor true. Jury use of the Internet is an issue so explosive that it cannot be ignored, nor can the Court afford the luxury of waiting four of five years for a split in the circuits.

The new popular phrase "Google mistrial" was coined by journalist John Schwartz of the New York Times on March 18, 2009.[1] In a front page article entitled *As Jurors Turn To Google and Twitter, Mistrials Are Popping Up*, Schwartz wrote:

> "Last week, a juror in a big federal drug trial in Florida admitted to the judge that he had been doing research on the case on the Internet directly violating the judge's instructions and centuries of legal rules. But when the judge questioned the rest of the jury, he got an even bigger shock. Eight other jurors had been doing the same thing. The federal judge, William J. Zloch, had no choice but to declare a mistrial, wasting eight weeks of work by federal prosecutors and defense lawyers...

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[1] John Schwartz, *As Jurors Turn To Google and Twitter, Mistrials Are Popping Up*, N.Y. Times, March 18, 2009, at A1.

> [I]t might be called a Google mistrial. The use of BlackBerrys and iPhones by jurors gathering and sending out information about cases is wreaking havoc on trials around the country, upending deliberations and infuriating judges...
>
> [A] juror on a lunch or bathroom break can find out many details about a case. Wikipedia can help explain the technology underlying a patent claim or medical condition, Google Maps can show how long it might take to drive from Point A to Point B, and news sites can write about a criminal defendant, his lawyers or expert witnesses."

Id.

Importantly, the "information" found on the Internet is not necessarily true or valid and certainly not subjected to cross-examination.

Dr. Douglas L. Keene, a psychologist and past-president of the American Society of Trial Consultants writes in *Online and Wired for Justice: Why Jurors Turn to the Internet (the "Google mistrial")*[2]:

> "Social media is a fact of life. If the current patterns hold true, we *will see increasing numbers of jurors* for whom social networking is so habitual and life-integrated, they will be

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[2] Douglas L. Keene and Rita R. Handrich, *Online and wired for Justice: Why Jurors turn to the Internet (the "Google" mistrial)*, The Jury Expert, 21(6), 14-24, available at http://www.thejury expert.com/wp-content/uploads/KeeneTJENov2009.pdf.

> hard-pressed to see the justification for abstaining from 'updating their status' during trial. Really. If a *burglar can't resist checking his Facebook* status while in the high-adrenaline process of burglarizing your home, what's to stop a juror during courtroom tedium?" (Emphasis added).

Id.

Dr. Keene also stated:

> [b]y July 2009, more than half (56%) of American adults have accessed the internet by wireless means. Cell phone access (32%) is only slightly behind laptop access (39%) and now, on a typical day, 19% of us access the internet on a mobile device. This number may seem low to the uber–connect attorney, but it is up from only 11% in December, 2007—for a growth of 73% during that 16 month period.
>
> An interesting aside: African Americans are the most active users of mobile internet. 48% have used the internet on a mobile device and, on an average day, 29% go online. Additionally, growth in mobile handheld use on an average day since 2007 among African Americans is twice the national average - - up 141% as compared to the 73% average increase.
>
> * * *
>
> Yet, even with higher use among attorneys in general, younger attorneys are more comfortable with social media than their older

> colleagues. A recent survey conducted for LexisNexis reports that 86% of attorneys between the ages of 25 and 35 are members of social networks compared to only 66% of those over age 46.

Id.

Dr. Keene's prediction of an *increasing number of jurors accessing the Internet during the trial* has proved to be accurate.

In an article entitled *As Jurors Go Online, US Trials Go off Track* [3], legal commentator Brian Grow of Reuters Legal states:

> The explosion of blogging, tweeting and other online diversions has reached into U.S. jury boxes, in many cases raising serious questions about juror impartiality and the ability of judges to control their courtroom.
>
> Reuters Legal, using data from the Westlaw online research... compiled a tally of reported decisions in which judges granted a new trial, denied a request for a new trial, or overturned a verdict, in whole or in part, because of jurors actions related to the Internet.
>
> The data show that since 1999, at least "90 verdicts" have been subjected to challenges

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[3] Brian Grow, *As jurors go online, U.S. trials go off track*, Reuters, December 8, 2010, available at http://www.reuters.com/article/2010/12/08/us-internet-jurors-idUSTRE6B74Z820101208.

> because of alleged Internet-related juror misconduct.
>
> More than half the cases occurred in the last two years. Judges granted new trials or overturned verdicts in 28 criminal and civil cases—21 since January 2009, the judges."
>
> In three quarters of the cases in which judges declined to declare mistrials, they nevertheless found Internet-related misconduct on the part of jurors. These figures do not include the many incidents of juror Internet abuse that escapes judicial notice.

Id.

Gone are the days when a lawyer's greatest fear was that a juror was "sleeping" during the presentation of the client's case. In this Digital Age of the 21st Century, the fear is *not* whether the juror is sleeping. Rather, it is whether the juror is "Googling" potentially prejudicial information about the client, or criminal defendant, and then "texting" it to certain jurors. Given the dramatic emergence and staggering growth of social networking sites, the fear is warranted.

This sudden cultural shift to instant informational accessibility and social networking, which began with our youth—is not only being embraced by hundreds millions of adults and baby boomers—but at an alarming rate. Cellular telephones, iPhones, Androids, Smart-Phones, and Blackberrys and other handheld devices are the enablers of America's new social addiction and ever deepening dependency to "always

being connected". Increasingly, fewer and fewer Americans cannot imagine *leaving home without it*. See, Keen, supra, *Online and Wired for Justice: Why Jurors Turn to the Internet (the "Google mistrial")*, for startling statistics and demographical breakdowns.

Doubtless, these new technologies perform extremely important social and business functions. But they do not come without considerable costs.

The "rapid changes in the dynamics of communication and transmission of information" acknowledged by this Court in *City of Ontario, California*, et. al. v. *Quon* et. al. 560 U.S.___ 2010 (a text message case that implicated the Fourth Amendment) now poses a serious and imminent threat to the right to a fair trial by impartial jurors guaranteed by the Fifth and Sixth Amendments to the United States Constitution.

The "dire consequences" of the new technologies to the integrity of the jury trials was thoroughly addressed in a 2010 law review article by Amanda McGee entitled *Juror Misconduct In The Twenty First Century: The Prevalence of the Internet And Its Effects On American Courtrooms*.[4] McGee writes:

> [t]he advancement of technology and the instantaneous access to the Internet is now creating some dire consequences for courthouses nationwide. Increasingly, jurors have engaged

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[4] Amanda McGee, *Juror misconduct in the 21st Century: The prevalence of the Internet and its effect on the American Courtrooms*, 30 Loy. L.A. Ent. Rev. 301 (2009-2010).

> in Internet activity to conduct outside research regarding the cases they sit on, including the applicable laws and the parties involved. Through Facebook and Twitter, jurors are even posting messages, blogs, and "tweets" to the online community about what is occurring in the courtroom and during jury deliberations. As modern jurors engage in such Internet-related misconduct, courts nationwide are forced to declare mistrials, wasting both time and taxpayer money. (*Id.* pp. 301, 302)
>
> * * *
>
> [m]ost curious jurors do not realize that researching a party on the Internet or viewing a crime scene on Google Maps violates court rules about seeking evidence independently and should therefore be educated about the rules of juror misconduct. The only way to adequately educate jurors is to make instructions *very precise* in explaining what they may and may not do while engaged in a trial. Rather than just going through boilerplate orders, judges must give the jurors detailed instructions before the trial begins, prohibiting *all* device usage, and then repeat those instructions numerous times throughout the course of the trial. (*Id.* pp. 316, 317)

Id.

Virtually every juror, in every courtroom across the nation comes to court with a wireless mobile-Internet access that fits neatly in a pocket or purse. With new technologies placing vast amounts of information

about the parties, corporation, witnesses, the attorneys or the judge at the fingertips of jurors, *thousands* of "Google mistrials" are now only a "Point-and-Click" away. See *The Fourth Amendment and the Brave New World of Online* Marquette Law Review by Nathan Petrashek.[5] The article discusses in great detail the origin of social networking sites and its effect on the Fourth Amendment. It also explains why "People are flocking to social networking sites (Facebook at a rate of 200,000 per day) and *disclosing* more information than ever using these services." Petrashek, 93 Marq. L. Rev. at 1506.

The Court is faced with the fact that the revolutions in Internet technology have suddenly overwhelmed our jury trial system. This case presents exceptionally important questions that have overarching significance far broader then the parties. Indeed, it will affect every jury, in every court in the nation. Because of this case, the Court has the opportunity to address an absolutely important judicial question, now, before the judicial system is simply overtaken by "Google mistrials".

Petitioner, Rodriguez, a former employee of respondent FedEx Freight East, Inc. ("FedEx") filed suit in state court under Michigan's Elliott Larson's Civil Rights Acts (ELCRA), Mich. Comp. Laws §§ 37.2101 et seq. alleging claims of constructive discharge, retaliation, hostile work environment and failure to promote because of his Hispanic accent. Citing diversity of citizenship, FedEx removed the suit

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[5] Nathan Petrashek, *The Fourth Amendment and the Brave New World of Online Social Networking*, 93 Marq. L. Rev. 1494, 1509

to the United States District Court for the Eastern District of Michigan. *In re Rodriguez v. FedEx Freight East, Inc.*, 487 F.3d 1001 (6th Cir. 2007) ("*Rodriguez I*"). FedEx filed a motion for summary judgment which was referred to the bankruptcy court after Rodriguez filed for bankruptcy. The motion was granted, and the decision was affirmed by the district court. *Id.* at 1005. Rodriguez appealed to the Sixth Circuit Court of Appeals.

On June 27, 2007 the Sixth Circuit held that the decision maker's disparaging comments concerning Rodriguez's Hispanic accent constituted direct evidence of national origin discrimination and remanded the failure to promote claim back to the district court. The district court's dismissal of all other claims was affirmed. *Id.* at 1005. Rodriguez appealed to the Sixth Circuit Court of Appeals.

On June 20, 2008, FedEx filed the Parties' Joint Proposed Jury Instructions in the district court. (Docket No. 2:08-CV-10637, R. 35, p. 18) Recognizing the widespread accessibility to information on the Internet—including the Sixth Circuit's written opinion in *Rodriguez I,* "both" parties agreed that the jurors should be specifically admonished from using the Internet for any purposes regarding the case. The specific "Internet" prohibition instruction (No. 13) read as follows:

> Jurors Not to Consider Information
> Received Outside Presence of Court
>
> The only information that you will receive about this case should come to you in this

courtroom. You must consider any information which may come to you outside this courtroom.

You must not make any investigations on your own or conduct experiments of any kind. This includes using the Internet for any purpose regarding this case.

If you discover a juror has violated my instructions, you should report it to me. (Emphasis added)

Id.

The record shows that the district court did *not* give the "jointly" requested instruction No. 13. Instead, the district court *inexplicably* gave an instruction that excluded the word "Internet". That instruction stated:

"Now a few words about conduct as jurors.

First, I instruct you that during the case you should not discuss the matter with anyone or permit anybody to discuss it with you. Until you retire to the jury room at the end of the case to deliberate on your verdict, you ought not talk about the case.

Secondly, do not read or listen to anything about the case in any way. If someone tries to talk to you about the case, bring it to the Court's attention promptly.

Third, *do not try to do any research* or make any investigation bout the case on your own, and finally, you ought not form any opinions

> about the outcome of the case until after you heard all the evidence. Keep an open mind until you start your deliberations at the end of the case." (Emphasis added)

Docket No. 2:08-CV-10637, R. 80, Tr. Vol. 1A, pp. 55-56.

The record also shows that the district judge did not explain his refusal to give the "Internet" instruction, nor did the district judge provide the parties with an opportunity to object pursuant to Fed. R. Civ. P. Rule 51(b)(1)(2).

Trial commenced on June 23, 2008 and ended on June 27, 2008. Following the close of proofs the district judge informed the eight jurors that *at least seven* of them must agree on a verdict. (Docket No. 2:08-CV-10637, R. 72 Tr. Vol. 5B, p. 20) After a few hours of deliberations the jury advised the court that a verdict had been reached. *Id.* at 25. The polling of jurors showed that *seven* of the eight jurors agreed on a verdict in favor of FedEx. *Id.* at 26. The district judge then told the jurors they were "excused", but that [he would] be coming back to talk with them before they leave. The record shows that counsels were not told that they could not talk to the jurors after they were excused.

After the jurors were discharged, petitioner's lead trial counsel, D. Rick Martin greeted and thanked all eight jurors for their service—while standing near the courthouse security checkpoint in the presence of U.S. Federal Marshals. (Docket No. 2:08-CV-10637, R. 48, Ex. 2) That is where juror #4 stated that he read all about the attorneys in the case on the "Internet"; and

knew that [petitioner's counsel D. Rick Martin] was a former United Automobile Workers (UAW) plant president. *Id.*

Petitioner's counsel timely filed a motion for a new trial or, in the alternative, a post-trial hearing on the juror misconduct issue. (Docket No. 2:08-CV-10637, R. 48) The motion was supported by several sworn affidavits, including affidavits from juror #5 (Docket No. 2:08-CV-10637, R. 50, Ex. 1, "Affidavit as to J.Callahan") and juror #2. (Docket No. 2:08-CV-10637, R. 50, Ex. 3, "Affidavit as to P. Hargrove") Both jurors attested that soon after the jury was released to begin deliberations, juror #4 told them that he knew all about the attorneys in the case because he went on the Internet. *Id.*

The jury foreman attests in pertinent part:

> 2. On June 27, 2008 the judge told us we could have lunch before beginning deliberations or we could begin deliberations after lunch.
>
> 3. Myself, Juror #4, Juror #1, Juror #7, and Juror #8, went out to get lunch. Before we began deliberations Juror #4 told us that he went on the Internet and read all about the attorneys in the case.
>
> 4. Juror #4 led the discussions in deliberations against finding in favor of Mr. Rodriguez and for finding in favor of FedEx.

Affidavit as to J.Callahan.

Juror #2 similarly attests:

> 2. On June 27, 2008 the Judge told us we could have lunch before beginning deliberations or we could begin deliberations after lunch.
>
> 3. It was decided that one juror would go and bring back lunch for the rest of us. However, five jurors decided to go get the lunch. Among the five jurors was Juror #4. He had told us that he knows all about the attorneys for Mr. Rodriguez and the attorney for the company. He stated he learned about the attorneys from the Internet.
>
> 4. When the five jurors returned, Juror #4 began arguing in favor of FedEx. Three jurors who left with him to bring back our lunch immediately agreed with Juror #4.

Affidavit as to P. Hargrove

Petitioner's counsel also filed an affidavit which attests:

> 3. Juror #4 told me that he learned all about the attorneys in the case from the Internet.
>
> 4. Juror #4 stated that he went online and read all about our background, education, and areas of practice. He stated that he knew that I was a former president in the UAW. Juror #4 also stated that he knew all about FedEx's attorney, her background, and the law firm she is with.

Docket No. 2:08-CV-10637, R. 48, Ex. 1, "Affidavit as to D. Martin"

The district court denied petitioner's motion *without* oral argument and *without* a hearing. The district judge stated that "[T]here are no exceptional or extraordinary circumstances warranting relief from the verdict under Rule 60(b)(6)." (Docket No. 2:08-CV-10637, R. 62, p. 8).

Petitioner timely filed a motion for reconsideration and specifically requested an evidentiary hearing limited to the juror misconduct issue. (App. R. 63) The request was denied. (App. R. 64) The district judge stated: "Although the Michigan Model Civil Jury Instruction 2.07 was offered as a *proposed* jury instruction it was not given." *Id.* (emphasis in original) In refusing to conduct an evidentiary hearing the court stated "there is absolutely no evidence that Juror #4 accessed the prior Sixth Circuit opinion in this matter." That is simply because the district court refused to hold a hearing.

Petitioner timely appealed to the Sixth Circuit. On November 15, 2010 the Sixth Circuit affirmed the district court's decisions. (App. 1a) Surprisingly, the Sixth Circuit did not analyze the district court's refusal to give the *jointly* requested Internet admonition, or its refusal to conduct a post-trial hearing to determine whether the extraneous *case-related* information tainted the integrity of the verdict. *Id.*

In a *passing* footnote the Sixth Circuit addressed amicus curiae briefs filed by the Michigan Association for Justice (App. 4a) and the National Lawyers Guild.

Id. Both organizations requested that the Sixth Circuit: (1) require all federal district court judges to give instructions that specifically prohibited jurors from using the Internet for any purposes regarding the case; (2) grant a new trial; and in the alternative; (3) remand the case back to the district court for an evidentiary hearing to determine whether the extraneous information tainted the integrity of the verdict. Mich. Assoc. of Justice, Amicus Brief filed July 2, 2009, in 6th Cir. case no. 08-2272; NLG Amicus Brief filed July 1, 2009, in 6th Cir. case no. 08-2272.

In denying the requested relief the Sixth Circuit stated:

> "The National Lawyers Guild and the Michigan Association for Justice have each moved for permission to file amicus briefs in this appeal. The National Lawyers Guild urges us to create a model jury instruction for civil cases forbidding jurors from accessing the internet and the Michigan Association for Justice urges us to make an investigatory hearing mandatory any time a juror does access the internet. Because we, as a three-judge panel, are not empowered to make these proclamations and because our disposition of this appeal pretermits these arguments, we DENY the motions."

App. 4a.

On December 13, 2010, petitioner timely filed a motion for rehearing en banc. On January 5, 2011, the motion was denied. (App. 39a).

In other words, the district court and then the Sixth Circuit Court of Appeals avoided addressing the issue that affects every trial in this country. Importantly, this issue is policy neutral. While the plaintiff was deprived of a fair trial in *this* case, the next time it will be a corporate defendant, or a criminal defendant.

On January 5, 2011 the Sixth Circuit granted petitioner's motion to stay the mandate until the disposition of the petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

> "Stoam Holdings, the company trying to overturn the $12.6 million judgment said a juror, Johnathan Powell, had sent Twitter messages during the trial. Mr. Powell's messages included 'oh and nobody buy Stoam. Its bad mojo and they'll probably cease to Exist, now that their wallet is 12 m lighter' and 'So Johnathan, what did you do today? Oh nothing really, I just gave away TWELVE MILLION DOLLARS of somebody else's money.'"

Schwartz, supra, n.1.

As the above illustrates, the increasingly prominent role the social media and the Internet plays in the 21st Century, poses an imminent and serious threat to the jury trial system—the cornerstone of our democracy.

The case for granting the petition is perhaps best made by jury trial expert, Jeffrey T. Frederick, the Director of the Jury Research Services Division of the

National Legal Research Group, Inc. The following are excerpts from an article entitled *You, the Jury, and the Internet*[6], published in 2010 by the American Bar Association:

> As the Internet has gained widespread acceptance as a source for news and information, it has become a serious contender for concern regarding juror exposure to case-related information and opinions. Information relating to a case, either indirectly or directly, can reach jurors via a variety of Internet avenues: computers, cell phones, personal digital assistants, and the like. *Once on the Internet, jurors may encounter case-relevant information from commercial and news media-related Web sites*, customized information and content into a multibillion-dollar business, even gaining entry into our culture – and dictionaries – as the verb for Internet searching itself, i.e., "to google." While the overall scope of the problem of jurors researching case-related issues on the Internet is unknown, *anecdotal evidence has been surfacing with increasing frequency that jurors regularly turn to the Internet for answers*...Using the Internet provides unique challenges in jury trials. The Internet provides jurors with greater access to information through search engines, media sources, party-oriented Web sites, and blogs. Each of these may *pose a threat to juror impartiality*. Attorneys and judges need to

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[6] Jeffrey T. Frederick, *You, the Jury, and the Internet*, 39(2) The Brief (2010).

> recognize that many jurors view such tools as being qualitively different from the traditional research tools and media sources forbidden by the courts. Hence, courts, with the help of attorneys, must design effective instructions and strategies for minimizing such undesirable activity.

Id.

American jurisprudence has spent the last *three hundred years* structuring methodologies to ensure fair and unbiased trials. Those structures include cross examination, careful development of evidentiary rules, and imposition of rules on the trial judge to control the information obtained by the jurors. The reason for those carefully developed procedures is the recognition that *biased* jurors will reach *unfair* conclusions. The Internet provides a powerful weapon to those very jurors intent on undermining the principle of a fair trial.

I. THE RAPID DEVELOPMENT OF TECHNOLOGY HAS PLACED IN THE HANDS OF EVERY JUROR THE CAPABILITY TO (1) OBTAIN EXTRANEOUS INFORMATION REGARDING A PARTY, WITNESS, LAWYER OR THE JUDGE (2) OBTAIN EXTRANEOUS INFORMATION CONCERNING THE FACTS IN THE CASE ITSELF, INCLUDING PREVIOUS OPINIONS AND COURT OF APPEALS DECISIONS; (3) OBTAIN OTHER LAWSUITS FILED AGAINST CORPORATE DEFENDANTS; (4) OBTAIN "LEGAL" DEFINITIONS AND STATUTES; (5) OBTAIN CRIMINAL BACKGROUND HISTORY; (6) OBTAIN YOUTUBE VIDEOS, PHOTOGRAHS, VIDEO DISCOVERY DEPOSITIONS, GOOGLE EARTH MAPS; AND (7) "TEXT" THE EXTRANEOUS INFORMATION TO OTHER JURORS EVEN WHILE SITTING IN THE JURY BOX. THE INTERNET-JUROR'S ABILITY TO WREAK HAVOC ON THE JURY TRIAL SYSTEM PRESENTS A QUESTION OF SUCH EXCEPTIONAL IMPORTANCE TO THE PUBLIC'S CONFIDENCE IN THE JURY SYSTEM THAT THE COURT CANNOT WAIT FOR A *SPLIT IN THE CIRCUITS* --WHICH MAY TAKE YEARS—AS THE NUMBER OF "GOOGLE MISTRIALS"—CONTINUE TO GROW

Accessing the mobile Web is a daily activity for 22.4 million mobile users in the U.S., according to research released by comScore. Between January 2008 and January 2009, the number of daily mobile web users doubled.

* * *

> A doctor who blogged under the pseudonym "Flea" decided to blog his own medical malpractice trial. *He blogged about the trial, his impressions of the plaintiffs' lawyer* (whom he nicknamed) and said jurors were dozing off. He was on the stand when, in a "Perry Mason moment" the plaintiff attorney said, "Are you Flea?" and he actually admitted he was. The plaintiff's attorney was obviously prepared to delve into the blog in open court and the case settled. (emphasis added)

Keene, supra, n.2.

Every day, in every courtroom across America, litigants face the very real danger of their case being decided, not by the evidence presented within the confines of the courtroom; but by information *streamed* into the deliberative process from *Cyberspace*. This Digital age information is now at the fingertips of every juror who walks into the courtroom with an *I-Phone, Smartphone, Blackberry*, or even a low cost *cell phone*. Gone are the days when rogue jurors had to endure the inconvenience and risk exposure by traveling to the library or to a crime scene to collect information to bolster their *predisposed* positions. Now, jurors can just—"*Google it*."

Jurors willing to use the Internet *are* capable of, and *will* inject bias into the process. See *Reining in juror misconduct: practical suggestions for judges and*

lawyers;[7] The Internet also allows jurors to communicate secretly with each other and discuss the case during the trial by using *pseudo* names to text, e-mail, blog, or tweet information. See Frederick, supra, n.6, *You, the Jury, and the Internet*.

The exclusionary rule would have no meaning if jurors could just Google newspaper accounts of the investigation, or criminal history or record properly excluded by the rules of evidence. Indeed, this is the very sort of juror misconduct that results in a criminal defendant being convicted based upon "information" accessed in *Cyberspace*, though the prosecutor plainly failed to present sufficient evidence in the Courtroom to support a conviction.

On January 1, 2010, the Florida Bar Journal published the following in an article entitled, "*Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers*":

> "(6) Some jurors will want to text what they are doing at any given and why they are doing it to friends, family and strangers. To say that current jurors have enhanced temptation and ability to communicate about the trial with the outside world is the understatement of this still young century. Jurors have the capability instantaneously to tweet, blog, text, e-mail, phone, and look up keep their digital 'windows to the world.' *Jury instruction by the judge*

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[7] Ralph Artigliere, Jim Barton, Bill Hahn, *Reining in juror misconduct: practical suggestions for judges and lawyers*, 84 Fla. Bar J. 8 (2010).

about communication outside the courtroom has not kept pace with technology. (emphasis added)

(7) The problem of outside influence on jurors is no longer confined to high profile cases that are covered in the press or other media. Courtroom misconduct seems to be everywhere. Recently, *a witness in Miami was discovered texting his boss about his testimony during a sidebar conference resulting in a mistrial*; (8) a South Dakota juror in a seat belt product liability case Googled the defendant and informed five other jurors that the defendant had not been sued previously; (9) a juror in a federal corruption trial in Pennsylvania posted his progress during deliberations on the Internet resulting in a motion for mistrial; (emphasis added) (10) a juror in Bartow, Florida, looked up a defendant's 'rap sheet' online and told fellow jurors, resulting in a mistrial; and jurors in Florida criminal case made anti-Semitic comments to each other and consulted one of the jurors' accountants during deliberations by telephone. (11) Nine of the jurors on a deliberating panel in a federal case in Miami admitted to the judge that they had been doing research on the case over the Internet, resulting in a mistrial. (12) *The judge learned that the jurors were Googling the lawyers and the parties, finding news articles about the case, researching definitions and information on Wikipedia, and looking for evidence that had been excluded in the case.* All of this was accomplished despite the judge's repeated instruction not to do so. (13) These examples represent recent transgressions that were

> discovered, and probably represent *just the tip of the iceberg* of juror behavior. (emphasis added)
>
> (14) Another dilemma is that jurors digitally linked to the outside world may receive unsolicited information relating to the trial from friends and family who know about their jury service. They may receive texts or e-mails inquiring about how the case is going or whether it is interesting. Outsiders thinking they are being helpful may forward articles or other materials they have found on the Internet to jurors. Texts or tweets may include unwanted advice or input on the 'hang that crook!' variety. It will be hard for the juror not to read such incoming material. Thus, a juror who does not intend to go looking for information or influencing commentary from others gets it anyway."

Artigliere, supra, n.7.

Judicial efficiency commands that this issue be addressed immediately before mistrials are accumulated en masse.

On July 22, 2010 USA Today[8] reported on Facebook's[9] celebration of its 500 millionth member—a

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[8] Kristin McGrath, *Status update: Facebook logs 500 million members*, USA Today, July 22, 2010, at D3.

[9] Facebook: www.facebook.com – Facebook is a social networking tool that allows people to communicate with their friends, family, and coworkers.

milestone reached on July 20, 2010—just *six years* after coming into existence. Kristin McGrath wrote:

> Facebook has amassed 100 million new members since February [2010] alone.
>
> "My prediction is that we'll reach a billion users on Facebook," says James Fowler, co-author of Connected: *The Surprising Power of our Social Networks*.
>
> Facebook's exponential growth, Fowler says, reflects the "classic" growth pattern of networking technologies. First comes the steady trickle of early adapters. Their real-life social networks become the next wave, which eventually draws in even those who are hesitant to embrace the technology – older generations who can now view pictures of their grandchildren on Facebook...."
>
> "Whether we're 500 million or a billion or more, it's still all about the site being personal and relevant for every individual," says Zuckerberg. "We really still think of ourselves as at the beginning of the journey."

Id.

In addition to Facebook, jurors have access to several other popular social networking sites to search for prejudicial information to bolster their position and enhance power in the jury room. These sites include

MySpace[10] which has more than 125 million worldwide users, and LinkedIn[11], a business networking site with approximately 90 million members.

The most popular micro-blogging site is Twitter[12]. It has approximately 105 million users. New users are signing up at a rate of 300,000 per day.

At Chirp, the official Twitter developer conference, Twitter shared some revealing stats about its site, users, and growth that had previously been kept under wraps. Here is a summary of the facts and figures Twitter shared:

- Twitter now has 105,779,710 registered users.
- New users are signing up at the rate of 300,000 per day.
- 180 million unique visitors come to the site every month.
- 75% of Twitter traffic comes from outside Twitter.com (i.e. via third party applications.)

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[10] MySpace: www.myspace.com – MySpace users create a profile and upload personal information.

[11] LinkedIn: www.linkedin.com – LinkedIn is a networking tool geared towards establishing and expanding business and professional contacts. It allows members to gather and share data, and collaborate on projects.

[12] Twitter: www.twitter.com – Twitter allows users to post limited messages that are then distributed to other users.

- Twitter gets a total of 3 billion requests a day via its API.

- Twitter users are, in total, tweeting an average of 55 million tweets a day.

- Twitter's search engine receives around 600 million search queries per day.

- Of Twitter's active users, 37 percent use their phone to tweet.

- Over half of all tweets (60 percent) come from third party applications.

- Twitter itself has grown: in the past year alone, it has grown from 25 to 175 employees.

Social media poses significant problems to the principles of a fair trial. It exposes the Internet-juror to certain "information" that will make it impossible to remain impartial. For example, an Internet-juror can hardly be expected or trusted to remain impartial after reading scathing derogatory rants about the plaintiff/employee, CEO/defendant or the criminal defendant—posted on Facebook by an ex-spouse, an ex-Facebook "friend", disgruntled co-worker or former business partner. See Jeffrey T. Frederick, *You, the Jury, and the Internet*, 39(2) The Brief (2010).

Manifest injustice will occur when an Internet-juror reads a Web-blog that discusses the litigant's *attorney's* political positions on highly controversial issues. Query: What protection does a litigant have against a juror that decides to vote against the litigant after discovering "Online" that the juror has sharp

disagreements with the litigant's attorney's political positions or religious beliefs. Sadly, the answer is—none.

The Internet can also taint the integrity of jury deliberations with information about corporate defendants that was either not disclosed during the trial or excluded by the judge. For instance, a juror can instantly find out about *other* lawsuits or class actions filed against the corporate defendant, simply by Googling its name. "Wikipedia" will reveal to the Internet-juror corporate assets, revenues, and even political donations that may never have been disclosed during the trial. This sort of extrajudicial information arms the Internet-juror with exceptional power and influence to weld over fellow jurors.

For example, if a juror discovers in his Internet research that the corporate defendant has paid millions in *similar* anti-trust or products liability lawsuits based upon the *same* defenses, the juror can use that that extraneous information whether it is accurate or not, to sway fellow jurors to vote against the defendant.

Video depositions of parties or expert witnesses are being posted by attorneys on their ads, websites, or blogs in anticipation of the trial and sleuthing jurors. Jurors have been caught setting up their own web-blog during the trial, and even taking an "online" poll on whether to vote guilty or innocent. See, Keene, supra, n.2.

While outrageous, it reflects American Idol culture, not judicial fairness. John Cord in *"Cell Phones and Juror Misconduct in Maryland's Courts"* states[13]:

> "The news and blogosphere has been chock-full of stories the past year about social networking in the courtrooms. There have been incidents of witnesses receiving text messages while giving testimony, and jurors posting status updates while in the jury box and doing internet research during deliberations. Some result in mistrials, and many lead to lengthy appeals that delay final justice.
>
> Most courts deal with the reality of social networking on a very reactive basis. Given the relatively recent explosion of networking sites, courts and rules committees have not yet addressed networking in the courtroom, with most restrictions being imposed individually by judges with little guidance. The principal issue presented to judges is whether to allow lawyers, witnesses and jurors access to their cell phones that almost universally have access to text messaging if not internet access. With internet access, the user has direct access to read and post messages on sites like Twitter and Facebook."

Id.

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[13] John Cord, *Cell Phones and Juror Misconduct in Maryland's Courts*, Generation J.D., Sep. 30, 2009, available at http://thedailyrecord.com/generationjd/2009/09/30/cell-phones-and-juror-misconduct-in-marylands-courts/.

More fundamentally, information fetched in *Cyberspace* from Google, Facebook and Twitter deceptively evades the rules of evidence developed over centuries, particularly the strict prohibitions against hearsay. *Cyberspace* information also contemptuously avoids the most reliable *search engine* ever invented for finding the truth—*courtroom cross-examination*.

Even more disturbing, there are confirmed reports of jurors and even judges requesting to be Facebook "*friends*" with the parties or witnesses or the attorneys—*during the trial, itself*. See Keene, supra, n.2, *Online and Wired for Justice: Why Jurors Turn to the Internet (the "Google mistrial")*.

Legal commentator and defense attorney Ken Strutin made the following observation in an article published in the New York Law Journal on May 20, 2009[14]:

> The indiscriminate use of blogs, tweets and text messages is assailing the sanctity of deliberations and threatening the constitutional rights of criminal defendants to a fair trial. As courts attempt to come to terms with technologically empowered jurors, new approaches and assumptions about the jury trial will be needed.
>
> In a spate of recent cases, the online behavior of sitting jurors has prompted defendants to

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[14] Ken Strutin, *Jury Deliberations in the Digital Age*, N.Y. L.J., May 20, 2009, available at http://www.law.com/jsp/article.jsp?id=1202430828839&slreturn=1&hbxlogin=1.

> challenge the fairness of verdicts in criminal and civil cases.

Id.

Also, a troubling threat to the integrity of the jury trial system is the Internet-juror's ability to access *"case-related"* information. With the advent of E-filing in the federal court system, motions, orders, written opinions on summary judgment motions, and court of appeals opinions related to the case on which the jurors are deciding, are easily accessible to jurors on the Internet.

Put simply, if a juror has a bias, or if a juror has a prejudice, that juror can use the Internet to bolster his or her position to attack the *objective* evidence presented in the courtroom. He or she will use that power to unfairly alter the jury verdict. The juror may or may not reveal the use of the Internet. Only judicial vigilance can protect the integrity of the system. Only the Supreme Court can enforce that vigilance.

If a juror obtains any extraneous information about the case, whether it is related to previous decisions, *undisclosed* facts about the case, the parties, or the attorneys it calls into question the integrity of the juror, and therefore, the verdict itself.

Trial court judges across America are scrambling to find effective means to protect the integrity of the jury trial system from both biased jurors and naïve jurors who cannot resist the temptation [or addiction] to Google or Tweet—on the case they are deciding. That challenge, without concrete guidance or leadership

from higher courts—is becoming increasingly more difficult and frustrating for the trial judges.

Regrettably, too often that challenge is not met. Too many judges simply fail to appreciate or comprehend the "rapid changes in the dynamics of communications..." *Quon*, supra., and the havoc it is wreaking on our jury trial system. The number of "Google mistrials" is alarming and is bound to rise even higher unless the Court steps in. Many legal commentators and scholars also acknowledge the need for uniform standards and guidance from the Court. See, e.g., Daniel A. Ross, *Juror Abuse Of the Internet*[15] which states that "[j]urors across the country have researched and discussed their trials via the Web, leading to mistrials and wasting weeks of litigation." Ross expressed concern about the "ineffective" control courts have over "online information" accessed by jurors which "can be "incorrect or incomplete".) *Id.* Paula Hannaford-Agor, the Director of the Center for Jury Studies at the National Center for State Courts, *Google Mistrials, Twittering Jurors, Juror Blogs, and Other Technological Hazards* published in Jury News, 2009, Vol. No. 24. Issue 2.[16] ("Examples of juror misconduct via technology have become so widespread and alarming that a new expression has developed to describe the problem: Google mistrials") *Id.* Dr. Keene *"The Dark Side of the Internet: In the Jury Room"*

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[15] Daniel A. Ross, *Juror Abuse of the Internet*, N.Y. L.J., Sept. 8, 2009 (need subscription to view per http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202433617873.

[16] Paula Hannaford-Agor, *Google Mistrials, twittering Jurors, Juror blogs,and other technological hazards*, 24 Ct. Manager, Issue 2, p. 42, available at http://www.ncsconline.org/D_Research/cjs/JuryNews2009Vol24No2.pdf.

(2009)[17] ("a justice system designed for a simpler time...") *Id.*

Approximately 3,500 to 5,500 federal civil and criminal jury trials are held each year. Given the ubiquity of cell phones, society's addiction to instant information, and the social networking phenomenon of Facebook and Twitter, it is not inconceivable that the number of "Google mistrials" could jump into the *thousands*. When mistrials occur everyone loses. Clients lose thousands and in some cases millions of dollars in attorney fees and litigation costs. Taxpayers lose tax dollars and the court loses valuable judicial resources.

Perhaps the greatest loss is the one sure to be suffered by the public. "Google mistrials" necessarily undermines the public's confidence in the court's ability to ensure the fairness of trial proceedings.

II. AN INSTRUCTION SPECIFICALLY PROHIBITING JURORS ACCESSING THE INTERNET IS NECESSARY TO PROTECT WITNESSES WHO MAY BE RELUCTANT TO TESTIFY OUT OF CONCERN THAT JURORS MAY TRY TO FIND THEM ON FACEBOOK OR TWITTER OR OTHER SOCIAL NETWORKING SITES

"Google mistrials" can also have a chilling effect on millions of potential witnesses who are on Facebook or MySpace or some other social networking sites. It is

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[17] Douglas L. Keene, Ph.D., Rita R. Handrich, Ph.D., *The Dark Side of the Internet: In the Jury Room*, Oct. 8, 2009, available at http://www.keenetrial.com/articles_15_2510325171.pdf.

essential that these witnesses feel secure in knowing that trial judges will instruct and make it clear to jurors that they are not allowed to *click* onto the witness' Facebook or any other social networking site.

Without such an admonishment many witnesses may chose not to appear and testify in jury trials in order to protect one's personal and private affairs, family members and friends from sleuthing Internet-jurors trolling for information to enhance their positions.

That is why the Court must step in. Trial court judges need concrete guidance, uniform standards, and the leadership that only this Court can provide.

Admittedly, this case does not involve a split in the circuits on whether a district court must give an instruction specifically prohibiting the jurors from using the Internet for purposes regarding the case. However, the Third, Eighth and Ninth Circuit Court of Appeals, unlike the Sixth Circuit, have formulated model/form instructions that *specifically* prohibit jurors from using the Internet for any purposes regarding the case. That instruction must be given to jurors by the trial judge.

In addition, the Sixth Circuit's decision to uphold the district court's refusal to give the jointly requested *Internet* instruction is inconsistent with the position recently taken by the Judicial Conference Committee on Court Administration and Case Management (CACM). On January 28, 2010, the CACM sent a "Memorandum" to the United States District Courts that recognizes the havoc the Internet wreaking on the jury trial system. The CACM "endorsed a set of

suggested jury instructions that district judges should consider using to help deter jurors from using electronic technologies to research or communicate about the case on which they serve."[18]

The letter also states: "*[T]he suggested instructions [attached] specifically inform jurors that they are prohibited from using these technologies in the courtroom, in deliberations, or outside the courthouse to communicate about or research cases on which they currently serve.*" *Id.*

Given the rising number of the Internet-related incidents of misconduct, the CACM instruction should not be "suggested"—but "mandated". Indeed, one need look no further then this case to see why.

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[18] Memorandum from Judge Julie A. Robinson, Chair, Judicial Conference Comm. on Court Admin. and Case Mgmt. to Judges, United States Circuit Courts (January 28, 2010) available at http://www.judges.org/pdf/jury- instructions-cip10.pdf.

III. THE DISTRICT COURT'S REFUSAL TO CONDUCT A POST-TRIAL HEARING TO (1) DETERMINE WHETHER THE CASE-RELATED INFORMATION ACCESSED ON THE INTERNET BY JUROR #4 TAINTED THE VERDICT AND (2) GIVE PETITIONER AN OPPORTUNITY TO DEMONSTRATE THAT THE EXTRANEOUS INFORMATION DEPRIVED PETITIONER OF THE RIGHT TO A FAIR TRIAL BY IMPARTIAL JURORS SHOULD BE REVIEWED

It is fundamental that every litigant who is entitled to trial by jury is entitled to an impartial jury, free to the furthest extent practicable from extraneous influences that may subvert the fact-finding process. See *McCoy v. Goldston*, 652 F.2d 654, 657 (6th Cir. 1981); *Kiernan v. Van Schraik*, 347 F.2d 775, 778 (3d Cir. 1965) Motions for a new trial on the basis of juror misconduct are left to the sound discretion of the trial court.

In this case, it was established that a juror specifically used the Internet to investigate the case and the attorneys. Yet, the district court not only denied petitioner's motion for a new trial or post-trial hearing, but did so without allowing oral argument. A hearing was warranted in this case, at least, because the district court knew that the court's dismissal of petitioner's entire lawsuit in *Rodriguez I* in addition to other adverse decisions rendered against petitioner were accessible to the public on the Internet.

Without determining the scope and breadth of what juror #4 read on the Internet, the court lacked a

rational basis to declare that the extraneous information did not taint the integrity of the verdict. *Wellons v. Hall,* 588 U.S. ___ (2010) Fundamental principles of due process as pronounced by precedents of this Court entitled petitioner to a post-trial hearing, at which petitioner would have the opportunity to demonstrate that juror #4's misconduct deprived him of his right to a fair trial by impartial jurors. *Smith v. Phillips*, 455 U. S. 209, 215-216 (1982); *McDonough Power Equipment v. Greenwood*, 464 U.S. 548, 556 (BLACKMUN J. concurring) *Wellons*, supra. ("After all, had there been discovery or an evidentiary hearing, Wellons may have been able to present more than "speculation" and mere "surmise.")

Moreover, where, as here, the claim of juror misconduct is based upon extraneous information, prejudice is presumed, and a hearing is mandated. See *Mattox v. United States,* 146 U. S. 140 (1892); *Stiles v. Lawrie,* 211 F.2d 188 (6th Cir. 1954); *Krause v. Rhodes*, 570 F.2d 563 (6th Cir. 1977).

With access to the Internet and *case-related* information now available with the simple use of a cell phone, the question of jury conduct using the Internet to obtain extraneous information is of "exceptional importance."

The Sixth Circuit also violated its own binding precedents established in *Nevers v. Killinger,* 169 F.3d 352 (6th Cir. 1999); see also *McCoy v. Goldston*, supra; and *Stiles v. Lawrie,* supra; *Krause v. Rhodes,* supra. Like in *Wellons*, supra., the Sixth Circuit's decision was made without knowing the breadth and scope of the rogue juror's Internet research. In the absence of any factual findings, it was plainly impossible for the

district court judge to determine whether the extraneous information tainted the jury's verdict.

This issue of juror-Internet misconduct has achieved prominence because it fundamentally affects jury trial procedure. Courts need guidance. More importantly, in the case at bar, petitioner was denied the opportunity to investigate the effect the Internet had on the decision-making process of the jury. At the very least, a hearing was mandated. For both reasons, the judgment should be reviewed.

What is expected from our judicial system is not an error free trial, but a trial process that is properly handled to achieve a fair and just result. That fair and just result was not achieved in this case.

IV. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTION PRESENTED

> Even just a cursory search on Twitter using the key words "court" and "jury duty" revealed the following two tweets: "Selected for jury duty. No tweeting from the box—court's order. We solemnly swore not to tweet" and "dudes I am twittering in court, THE FUTURE OF JURY DUTY."

McGee, supra, n.4.

These two "Tweets" begs the question: what *is* the future of our jury trial system when jurors while sitting in the jury box or during breaks are able to use their mobile devices to Google, Text, Blog, and Tweet about the trial.

This case presents the Court with perhaps its first opportunity to provide concrete guidance and leadership to trial judges grappling daily with these extremely thorny issues–issues created by a "brave new world of technology."

The right to a fair trial by impartial jurors is arguably the most important right in a free and open society.

That right, however, is being threatened *every day* in *every* courtroom in the country by jurors who simply cannot resist the temptation to do research with their Cellular telephones, Androids, Blackberrys, iPhones, Smartphones, Evo-4s, laptops and home computers; or to discuss the case they are in the process of deciding on such social networking sites as Facebook, Twitter, MySpace, and LinkedIn—to name just a few.

The question of whether trials will be decided by information obtained in *Cyberspace*, or by evidence tested within the confines of the courtroom–can only be answered by this Court.

This case provides the Court with an appropriate vehicle to address the following questions of exceptional public importance. The procedures to be followed relative to the use of the Internet during jury trials. The procedures to be used once the violation is discovered. The methodology to be used in determining whether a fair trial has been denied.

The right to a trial by an impartial jury is too important, and the threat to that right too great, to allow the Sixth Circuit's decision to stand. Trial judges throughout the nation eagerly await the much needed

concrete guidance, constitutional standards–and the leadership that only this Court can provide.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be granted, to review the judgment and opinion of the Sixth Circuit. In the alternative, the Solicitor General should be invited to file a brief in this case expressing the views of the United States.

Respectfully submitted,

D. Rick Martin
Counsel of Record
220 Bagley, Suite 808
Detroit, MI 48226
313-963-1320
drmartin@glottaassociates.com

Counsel for Petitioner

APPENDIX

TABLE OF CONTENTS

Appendix A: Decision, United States Court of Appeals for the Sixth Circuit (November 15, 2010) 1a

Appendix B: Order Denying Plaintiff's Motion for Reconsideration #63, United States District Court, Eastern District of Michigan, Southern Division (September 17, 2008) 5a

Appendix C: Order Denying Plaintiff's Motion for Judgment Notwithstanding the Verdict or a Mistrial or a New Trial (#48), and Denying Defendant's Motion to Strike Remarks (#55), United States District Court, Eastern District of Michigan, Southern Division (September 5, 2008) 9a

Appendix D: Judgment for Defendant, Jury Verdict, United States District Court, Eastern District of Michigan, Southern Division (June 27, 2008) 37a

Appendix E: Order denying rehearing, United States Court of Appeals for the Sixth Circuit (January 5, 2011) 39a

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 08-2272

[Filed November 15, 2010]

In re: JOSE ANTONIO RODRIGUEZ,	)
	)
Debtor,	)
	)
	)
STUART GOLD, TRUSTEE FOR, THE ESTATE OF JOSE ANTONIO RODRIGUEZ,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
FEDEX FREIGHT EAST, INC.,	)
	)
Defendant-Appellee.	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Before: BATCHELDER, Chief Circuit Judge; SUTTON and KETHLEDGE, Circuit Judges.

ALICE M. BATCHELDER, Chief Judge. Jose Rodriguez sued his former employer, FedEx Freight East, Inc., alleging various claims of discrimination and retaliation on the basis of his race, in violation of Michigan's Elliott-Larsen Civil Rights Act ("ELCRA"), Mich. Comp. Laws §§ 37.2101 *et seq*. FedEx obtained summary judgment on all claims and, on appeal, we affirmed that judgment except as to Rodriguez's claim that FedEx had refused to promote him because of his Hispanic accent. That claim we remanded for trial. *In re Rodriguez*, 487 F.3d 1001 (6th Cir. 2007).

On remand, the case was tried to a jury and the jury returned a verdict for FedEx. Rodriguez moved for JNOV, mistrial, a new trial, and an order striking certain testimony. He alleged errors based on juror misconduct, evidentiary rulings, jury instructions, defense counsel misconduct, insufficiency of the evidence, and the court reporter's misconduct. The district court considered the motion and authored a thorough and meticulous 19-page opinion denying it. *See Rodriguez v. FedEx Freight East, Inc.*, 2008 WL 4155677, at *13 (E.D. Mich. Sept. 5, 2008) (unpublished). Rodriguez moved for reconsideration and the district court denied that motion as well. *See Rodriguez v. FedEx Freight East, Inc.*, 2008 WL 4290180, at *2 (E.D. Mich. Sept. 17, 2008) (unpublished).

After carefully reviewing the record, the law, and the briefs and arguments on appeal, we find that the district court's opinion correctly sets out the applicable law and correctly applies that law to the facts in the

record. But we think it wise to address very briefly Rodriguez's claim that the district court erred in refusing to give the "mixed motive" jury instruction Rodriguez requested. The district court properly instructed the jury using the Michigan Model Civil Jury Instructions, including the instructions explaining Michigan's definition of employment discrimination and the burden of proof for Michigan employment discrimination cases. Those instructions explicitly explained to the jury that Rodriguez's national origin "does not have to be the only reason, or even the main reason" that FedEx did not promote him, but it did have to be "one of the reasons which made a difference in determining whether or not to promote [him.]" Further, the instruction required the jury to find in favor of Rodriquez if it found that FedEx failed to promote him and that his national origin was one of the reasons for that failure. Rodriguez now claims that these instructions are contrary to our opinion reversing the summary judgment for FedEx on this claim and remanding it for trial. Rodriguez is mistaken. Our earlier opinion simply held that sufficient evidence had been presented to raise a jury question as to whether FedEx had acted with a discriminatory motive, and that FedEx had failed to demonstrate *at the summary judgment stage* that even if it had acted with discriminatory motive, it would nonetheless have taken the same action for legitimate reasons. The court's jury instructions comport with this legal framework even if they are not as specific as the ones Rodriguez proposed. After reviewing the trial record, we find no error in the district court's providing the jury with the instructions that we have repeatedly found to be correct as a matter of Michigan law.

We conclude that the issuance of a full written opinion by this court would serve no useful purpose. Accordingly, for the reasons stated in the district court's opinions, we **AFFIRM**.[1]

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[1] The National Lawyers Guild and the Michigan Association for Justice have each moved for permission to file amicus briefs in this appeal. The National Lawyers Guild urges us to create a model jury instruction for civil cases forbidding jurors from accessing the internet and the Michigan Association for Justice urges us to make an investigatory hearing mandatory any time a juror does access the internet. Because we, as a three-judge panel, are not empowered to make these proclamations and because our disposition of this appeal pretermits these arguments, we DENY the motions.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Bkrptcy No. 04-47510-PJS
Adversary No. 05-5149-PJS
HON. PHILLIP J. SHEFFERLY
Case No. 08-CV-10637
HON. GEORGE CARAM STEEH

[Filed September 17, 2008]

JOSE RODRIGUEZ,

Plaintiff,

vs.

FEDEX FREIGHT EAST, INC.,

Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION (#63)

Plaintiff Jose Rodriguez moves for reconsideration of this court's September 5, 2008 Order denying Rodriguez's motion for judgment notwithstanding the verdict or a new trial. Generally, and without restricting the court's discretion, the court will not

grant a motion for reconsideration that merely presents the same issues ruled upon by the court, either expressly or by reasonable implication. The movant must not only demonstrate a palpable defect by which the court and the parties have been mislead but also show that correcting the defect will result in a different disposition of the case. E.D. Mich. LR 7.1(g)(3).

Rodriguez has failed to demonstrate palpable error. Rodriguez's assertion that the court instructed the jurors not to "[use] the Internet for any purpose regarding this case" is simply false and, not surprisingly, unsupported by a citation to the record. Although Michigan Model Civil Jury Instruction 2.07 was offered as a *proposed* jury instruction, the instruction was not given. Attorney Martin's attestation that "Juror #4 told me that he learned all about the attorneys in the case from the Internet," and Juror #2's and Juror #5's attestations that Juror #4 "told us that he knows all about the attorneys for Mr. Rodriguez and the attorney for the company," "stated he learned about the attorneys from the Internet," and "that he went on the Internet and read all about the attorneys in the case," are insufficient on their face to set aside the jury verdict or establish a prima facie case of impropriety. Marks v. Shell Oil Co., 895 F.2d 1128, 1130 (6th Cir. 1990); Hard v. Burlington Northern RR Co., 870 F.2d 1454, 1461 (9th Cir. 1989). Rodriguez's assertion that Juror #4 did more than learn about Counsel over the Internet is not supported by the proffered affidavits; the affidavits do not support an inference that Juror #4, for example, read a prior Sixth Circuit opinion related to this lawsuit. Indeed, Rodriguez's Counsel Attorney Rick Martin responded to FedEx's motion to strike this assertion by

candidly admitting that co-Counsel Attorney Glotta "*erroneously believed* that the 6th Circuit decision shown to him by plaintiff's counsel Rick Martin, was located on defense counsel Laura Brodeur's website." Plaintiff's August 18, 2008 Response to Motion to Strike, at 1 (emphasis added). Rodriguez's assertion that Juror #4 obtained specific information about the parties' Counsel as set forth in pages 3-9 of the motion for reconsideration is also unsupported by the affidavits. Rodriguez's argument that the court must grant an evidentiary hearing on this record is without merit, and merely presents the same issue already ruled upon by the court. E.D. Mich. LR 7.1(g)(3). The court makes clear that there is absolutely no evidence that Juror #4 accessed the prior Sixth Circuit opinion issued in this matter.

Attorney Martin does not in his more recent affidavit materially contest the circumstances by which he obtained information from Jurors #2, #4, and # 5. As previously set forth by the court:

> Rodriguez's Counsel [Mr. Martin] . . . advanced no reasonable grounds leading him to believe the jury verdict was subject to undue influence *before* he began questioning Jurors # 2, #4, and #5 without notice to this court or opposing Counsel. Simmons First National Bank, 88 F.R.D. [344, 347-48 (E.D. Ark. 1980) (citing inter alia Stephens v. City of Dayton, 474 F.2d 997 (6th Cir. 1973))]. Instead, Rodriguez's Counsel chose to question the jurors alone in the hallway after they left the jury room. Counsel had the opportunity to obtain a "perspective on the verdict" from the jurors in the presence of the court by joining the court in

> talking with the jurors in the jury room immediately after trial. Counsel's attestation that Juror #4 "was the most outspoken in *explaining and defending the verdict*" strongly suggests improper questioning of the Jurors regarding matters that occurred during the course of deliberations and the Juror's mental processes in connection with the verdict. See Fed. R. Evid. 606(b). Counsel's post-verdict examination of the Jurors on behalf of his client, without notice to the court or opposing counsel, and without pre-existing grounds for reasonably believing the verdict was tainted, went beyond idle curiosity and was improper. Simmons First National Bank, 88 F.R.D. at 347-48.

September 5, 2008, at 7-8. Counsel's improper questioning of the jurors cannot be condoned. Simmons First National Bank, 88 F.R.D. at 347-48.

Absent a demonstration of palpable error, Rodriguez's motion for reconsideration is hereby DENIED.

SO ORDERED.

Dated: September 17, 2008

s/George Caram Steeh
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

[*Certificate of Service omitted in printing this appendix*]

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APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Bkrptcy No. 04-47510-PJS
Adversary No. 05-5149-PJS
HON. PHILLIP J. SHEFFERLY
Case No. 08-CV-10637
HON. GEORGE CARAM STEEH

[Filed September 5, 2008]

JOSE RODRIGUEZ,

Plaintiff,

vs.

FEDEX FREIGHT EAST, INC.,

Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR A MISTRIAL OR A NEW TRIAL (#48), AND DENYING DEFENDANT'S MOTION TO STRIKE REMARKS (#55)

Plaintiff Jose Rodriguez moves for relief from judgment, judgment as a matter of law[1], a mistrial, or a new trial following a June 27, 2008 jury verdict finding Rodriguez was not denied a promotion to supervisor by defendant FedEx Freight East, Inc. because of intentional discrimination based on national origin. Oral argument would not significantly aid the decisional process. Pursuant to E.D. Mich. Local R. 7.1(e)(2), it is ORDERED that the motion be resolved without oral argument.

The circumstances underlying this lawsuit have been set forth in prior opinions and orders, and will be reiterated herein only to the extent necessary to adjudicate the instant motions. See May 27, 2008 Order. Following remand from the Sixth Circuit, Rodriguez's remaining claim that he was denied a promotion to FedEx supervisor in violation of Michigan's Elliott-Larsen Civil Rights Act (ELCRA), M.C.L. §§ 37.2101 et seq., was tried before a jury. The jury trial was conducted over five days, from June 23 through June 27, 2008, with the jury returning its verdict of no cause of action on June 27, 2008.

I. Plaintiff's Motion for Relief from Judgment, Judgment as Matter of Law, Mistrial, or New Trial

Rodriguez moves alternatively for relief from judgment under Rule 60(b)(6), judgment as a matter of law under Rule 50, a mistrial, or a new trial under Rule 59 premised on assertions of: (1) juror

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[1] Rodriguez refers to his motion in the state court vernacular "motion for judgment notwithstanding the verdict."

misconduct; (2) errors in the admission and exclusion of evidence; (3) errors in the denial of Rodriguez's proposed jury instructions; (4) defense counsel's misconduct; and (5) the evidence failing to support the jury verdict.

A motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(6) should be granted only under exceptional or extraordinary circumstances which are not addressed in Rule 60(b)(1-5). Hopper v. Euclid Manor Nursing Home, Inc., 867 F.2d 291, 294 (6th Cir. 1989). Accordingly, motions for relief from judgment under Rule 60(b)(6) are addressed in the district court's "especially broad" scope of discretion. Id.

A motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50 is decided in the district court's discretion. Brown v. Village Green Mgt. Co., 342 F.3d 620, 626 (6th Cir. 2003). In a diversity case such as this, the district court applies the state law standard of review to motions for judgment as a matter of law challenging the sufficiency of the evidence necessary to support a jury verdict. Id; King v. Ford Motor Co., 209 F.3d 886, 893 (6th Cir. 2000). "Under Michigan law, a judgment as a matter of law may not be granted unless reasonable minds could not differ as to the conclusions to be drawn from the evidence." Ridgway v. Ford Dealer Services, Inc., 114 F.3d 94, 97 (6th Cir. 1997) (internal quotations omitted). "A motion [for judgment as a matter of law] under Rule 50(b) is not allowed unless the movant sought relief on similar grounds under Rule 50(a), before the case was submitted to the jury." Exxon Shipping Co. v. Baker, 128 S.Ct. 2605, 2617 n.5 (2008) (citing Fed. R. Civ. P. 50(b), Zacher v. Lee, 363 F.3d 70,

73-74 (1st Cir. 2004), and 9B C. Wright & Miller, Federal Practice and Procedure § 2537, 603-604 (3d ed.2008)).

Whether to grant a mistrial is also within the district court's discretion. Surles v. Greyhound Lines, Inc., 474 F.3d 288, 302 (6th Cir. 2007). A district court may grant a mistrial on finding that a reasonable probability exists that the jury verdict was influenced by improper conduct. Id.

A motion for a new trial under Federal Rule of Civil Procedure 59 is likewise directed to the district court's discretion. Denhof v. City of Grand Rapids, 494 F.3d 534, 543 (6th Cir. 2007). A motion for a new trial may be premised on grounds that include the verdict is against the weight of the evidence or the movant was not given a fair trial. Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251 (1940). Even in diversity cases, the district court applies federal law in deciding a motion for a new trial. Ridgway, 114 F.3d at 98. The court should deny a motion for a new trial if the verdict was reasonably reached. Id.

A. Asserted Juror Misconduct

Rodriguez moves for an evidentiary hearing and a new trial based on the alleged misconduct of Juror #4, as attested to by Rodriguez's Counsel Attorney D. Rick Martin, Juror #2, and Juror #5. Attorney Martin attests:

> 1. Following the verdict, I spoke with the jurors to thank them for their jury service and obtain some perspective on the verdict.

2. Juror #4 was the most outspoken in explaining and defending the verdict.

3. Juror #4 told me that he learned all about the attorneys in the case from the Internet.

4. Juror #4 stated that he went online and read all about our background, education, and areas of practice. He stated that he knew that I was a former president in the UAW. Juror #4 also stated that he knew all about FedEx's attorney, her background, and the lawfirm she is with.

Juror #2 attests:

1. I was Juror #2, one of eight jurors in the trial of Jose Rodriguez v. FedEx Freight East, case No. 08-cv-10637. The case was tried in the U.S. District Court for the Eastern District of Michigan. The trial began on June 23, 2008 and ended on June 27, 2008.

2. On June 27, 2008 the Judge told us we could have lunch before beginning deliberations or we could begin deliberations after lunch.

3. It was decided that one juror would go and bring back lunch for the rest of us. However, five jurors decided to go get the lunch. Among the five jurors was Juror #4. He had told us that he knows all about the attorneys for Mr. Rodriguez and the attorney for the company. He stated he learned about the attorneys from the Internet.

4. When the five jurors returned, Juror #4 began arguing in favor of FedEx. Three jurors who left with him to bring back our lunch immediately agreed with Juror #4.

Juror #5 attests:

1. I was Juror number 5, one of eight jurors in the trial of Jose Rodriguez v. FedEx Freight East, Case No. 08-cv-10637. The case was tried in the United States District Court for the Eastern District of Michigan. The trial began on June 23, 2008 and ended on June 27, 2008.

2. On June 27, 2008 the judge told us we could have lunch before beginning deliberations or we could begin deliberations after lunch.

3. Myself, Juror #4, Juror #1, Juror #7, and Juror #8 went out to get lunch. Before we began deliberations Juror #4 told us that he went on the Internet and read all about the attorneys in the case.

4. Juror #4 led the discussions in deliberations against finding in favor of Mr. Rodriguez and for finding in favor of FedEx.

Federal Rule of Evidence 606(b) provides:

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other

> juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

Rule 606(b) itself "makes no attempt to specify the substantive grounds for setting aside verdicts for irregularity." 1972 Advisory Note to Fed. R. Evid. 606(b).

"[W]hether or not extraneous influences have so prejudiced jury consideration of the issues in the jury trial as to warrant reversal for new trial is an issue to be decided by the standards of federal law," and is a matter to be decided in the district court's discretion. Gault v. Poor Sisters of St. Frances Seraph of the Perpetual Adoration, Inc., 375 F.2d 539, 549 (6th Cir. 1967). To be entitled to an evidentiary hearing on the issue of undue influence, the party seeking the hearing must allege the specific conduct by a juror that resulted in the undue influence. Marks v. Shell Oil Co., 895 F.2d 1128, 1131 (6th Cir 1990).

> Looking only at affidavits and testimony admissible under Rule 606(b), the court must decide whether an evidentiary hearing is

> required to determine whether a new trial is necessary. An evidentiary hearing is justified only when these materials are sufficient on their face to require setting aside the verdict. Where a losing party in a civil case seeks to impeach a jury verdict, it must be shown by a preponderance of the evidence that the outcome would have been different. Unless the affidavits on their face support this conclusion, no evidentiary hearing is required. . . . .

Hard v. Burlington Northern RR Co., 870 F.2d 1454, 1461 (9th Cir. 1989). See also Marks, 895 F.2d at 1130 (reasoning that an evidentiary hearing must be granted "when the challenging party alleges facts that establish a prima facie case of impropriety"). "On a motion for an evidentiary hearing, any doubt must be resolved in favor of granting the motion, if the movant articulates a particular fact that would deny a fair trial." Marks, 895 F.2d at 1130.

In assessing Rule 606(b) affidavits, courts should also examine the circumstances under which the affidavits were obtained.

> Even though this is a civil case, the ABA's Standards Relating to the Administration of Criminal Justice are pertinent. They suggest notice to opposing counsel and the court:
>
> After verdict, the lawyer should not make comments concerning an adverse verdict or ask questions of a juror for the purpose of harassing or embarrassing the jury in any way which will tend to influence judgments in future jury service. If the lawyer has reasonable ground to

believe that the verdict may be subject to legal challenge, he may properly, if no statute or rule prohibits such course, communicate with jurors for that limited purpose, upon notice to opposing counsel and the court.

Before interviewing the jurors in this case, counsel did not give notice either to the court or opposing counsel. Inquiry was directed to matters clearly precluded by Rule 606(b). In Rakes v. U.S., 169 F.2d 739, 745-6, (4 Cir.), cert denied, 335 U.S. 826, 69 S.Ct. 51, 93 L.Ed. 380 (1948), the Fourth Circuit condemned the practice in no uncertain terms:

> He who makes studied inquiries of jurors as to what occurred there acts at his peril, lest he be held as acting in obstruction of the administration of justice. Much of such conversation and inquiry may be idle curiosity, and harmless, but a searching and pointed examination of jurors in behalf of a party to a trial is to be emphatically condemned. It is up to the courts to protect jurors from it.

Simmons First National Bank v. Ford Motor Co., 88 F.R.D. 344, 347-48 (E.D. Ark. 1980) (citing inter alia Stephens v. City of Dayton, 474 F.2d 997 (6th Cir. 1973)). See also Munafo v. Metropolitan Transportation Auth., 381 F.3d 99, 107-08 (2nd Cir. 2004) (recognizing that courts may evaluate the circumstances under which Rule 606(b) affidavits were obtained in assessing their evidentiary weight).

The specific improper conduct set forth in the proffered Rule 606(b) affidavits — that Juror #4 told

his fellow jurors prior to deliberations that he knew all about the parties' attorneys from information he had read on the Internet — is insufficient on its face to set aside the verdict on a finding that the outcome of the trial would have been different had Juror #4 not engaged in the conduct. Hard, 870 F.2d at 1461. Juror #4 is not alleged to have told the other jurors the substance of the information he learned about the attorneys. Counsel themselves gave descriptions of their backgrounds to the jurors during the course of trial. It was readily apparent that Mr. Martin was representing an employee alleging national origin discrimination against a large corporation represented by Ms. Brodeur. Any undue bias a particular juror held against attorneys who represent minority employees or large corporations was the proper subject of voir dire. See McCoy v. Goldston, 652 F.2d 654, 657 (6th Cir. 1981). Rodriguez's argument that the jury reached its verdict by relying on an unjust bias against Rodriguez's Counsel arising from Juror #4's pre-deliberation statements that he learned all about the attorneys from the Internet is conjecture. See McCoy, 151 F.3d at 659 n.9 ("In all cases, the allegations in the moving papers must be sufficiently specific, detailed, and nonconjectural so that fact issues are raised.").

Rodriguez's argument that Juror #4 violated the court's preliminary jury instructions is erroneously premised on Michigan Model Civil Jury Instruction 2.07, *an instruction that was not given to the jury*. Juror #4 was not instructed, as Rodriguez claims, not to "[use] the Internet for any purpose regarding this case." See Plaintiff's July 7, 2008 Motion Brief,¶ 3, at 2; Plaintiff's July 31, 2008 Reply Brief, at 1. In any event, Juror #4's conduct on its face does not establish

a prima facie case of impropriety which denied Rodriguez a fair trial. Hard, 870 F.2d at 1461; Marks, 895 F.2d at 1130. Unlike McCoy and Dyer v. Calderon, 151 F.3d 970 (9th Cir. 1998), relied upon by Rodriguez, the specific conduct set forth in the proffered Rule 606(b) affidavits does not include deliberate concealment or purposefully incorrect responses made to the court during voir dire indicating an improper bias. Compare McCoy, 151 F.3d at 658-59; Dyer, 151 F.3d at 975-976.

Rodriguez's Counsel has advanced no reasonable grounds leading him to believe the jury verdict was subject to undue influence *before* he began questioning Jurors # 2, #4, and #5 without notice to this court or opposing Counsel. Simmons First National Bank, 88 F.R.D. at 347-48. Instead, Rodriguez's Counsel chose to question the jurors alone in the hallway after they left the jury room. Counsel had the opportunity to obtain a "perspective on the verdict" from the jurors in the presence of the court by joining the court in talking with the jurors in the jury room immediately after trial. Counsel's attestation that Juror #4 "was the most outspoken in *explaining and defending the verdict*" strongly suggests improper questioning of the Jurors regarding matters that occurred during the course of deliberations and the Juror's mental processes in connection with the verdict. See Fed. R. Evid. 606(b). Counsel's post-verdict examination of the Jurors on behalf of his client, without notice to the court or opposing counsel, and without pre-existing grounds for reasonably believing the verdict was tainted, went beyond idle curiosity and was improper. Simmons First National Bank, 88 F.R.D. at 347-48.

Upon assessing the proffered Rule 606(b) affidavits and the circumstances under which they were obtained, Rodriguez is not entitled to an evidentiary hearing or a new trial. Gault, 375 F.2d at 549; Hard, 870 F.2d at 1461; Marks, 895 F.2d at 1130-1131. There are no exceptional or extraordinary circumstances warranting relief from the verdict under Rule 60(b)(6). Hopper, 867 F.2d at 294. Rodriguez is not entitled to a mistrial or new trial on the grounds that the jury verdict was probably influenced by improper conduct. Surles, 474 F.3d at 302; Denhof, 494 F.3d at 543; Ridgway, 114 F.3d at 98.

B. Evidentiary Rulings

Rodriguez argues he was denied a fair trial by the admission of evidence in violation of Federal Rule of Evidence 803(6) governing records of regularly conducted activities. Rodriguez argues the court erred in admitting into evidence: (1) a July 15, 2002 letter written by FedEx Regional Human Resources Manager Rodney Adkinson recommending the termination of FedEx Customer Service Manager John McKibbon, and an attached "survey"; (2) the employment applications of Don Spinney and Michael Burdick; (3) a list of supervisor applicants who completed the Leadership Apprentice Course (LAC) after Rodriguez resigned; and (4) certain internal FedEx e-mails indicating Rodriguez was not completing LAC requirements. Rodriguez also argues the court erred in admitting only a redacted copy of Rodriguez's resignation letter.

Whether to admit or exclude evidence is in the district court's discretion. Williams v. General Motors Corp., 18 Fed. Appx. 342, 344-345 (6th Cir. Aug. 24

2001) (citing Muzquiz v. W.A. Foote Mem. Hosp., Inc., 70 F.3d 422, 428 (6th Cir. 1995)). For a witness to lay a proper foundation for the admission of evidence under Rule 803(6), all that is required is that the witness is familiar with the record keeping system. Dyno Construction Co. v. McWane, Inc., 198 F.3d 567, 575-576 (6th Cir. 1999). In reviewing a motion for a new trial premised on an erroneous admission of evidence, this court will "view the evidence in the light most favorable to its proponent, giving the evidence its maximum reasonable probative value and its minimum reasonable prejudicial value." Williams, 18 Fed. Appx. at 345 (quoting Muzquiz, 70 F.3d at 428). Even if a trial court abuses its discretion in admitting evidence, a new trial should not be granted unless a "substantial right of the party is affected." Id. (citing Fed. R. Evid. 103(a), Slayton v. Ohio Dep't of Youth Servs., 206 F.3d 669, 677 (6th Cir. 2000), and Morganroth & Morganroth v. DeLorean, 123 F.3d 374, 382 (6th Cir. 1997)). An error in the admission or exclusion of evidence does not warrant a new trial unless "the evidence would have caused a different outcome at trial." Tompkin v. Phillip Morris USA, Inc., 362 F.3d 882, 891 (6th Cir. 2004) (quoting Morales v. Am. Honda Motor Co., 151 F.3d 500, 514 (6th Cir. 1998)).

i. July 15, 2002 Letter and Survey

Adkinson himself laid a proper foundation for the July 15, 2002 letter and survey. Dyno Construction, 198 F.3d at 575-576. The fact that McKibbon was not given a copy of the internal letter and survey before he resigned is of no demonstrated consequence. Rodriguez's assertion that the documents lacked "trustworthiness" is not well taken. Rodriguez's

demand to proceed immediately to trial on remand, without the benefit of discovery initially recommended and ordered by the court, explains why the letter and survey were not previously disclosed. Rodriguez's reliance on Michigan law to support his claim of error in the admission of evidence under Federal Rule of Evidence 803(6) is without merit. See Legg v. Chopra, 286 F.3d 286, 289 (6th Cir. 2002) (recognizing that "the Federal Rules of Evidence, rather than state evidentiary laws, are held to apply in federal diversity proceedings."). Viewing the July 15, 2002 letter and survey in the proper light, the evidence was properly admitted to challenge the credibility of McKibbon's testimony. Williams, 18 Fed. Appx. at 345.

ii. Employment Applications of Spinney and Burdick

Rodriguez's argument that the job applications of Spinney and Burdick lacked trustworthiness because job applicants often lie on their applications is wholly without merit. Rodriguez was free to make this argument to the jury. The applications were properly admitted under the business records exception to hearsay under Rule 803(6). Williams, 18 Fed. Appx. at 344-345.

iii. List of LAC Participants and E-Mails

Rodriguez's arguments that the list of LAC participants and e-mails indicating Rodriguez was not participating in the LAC were, again, not trustworthy, is without merit. Adkinson and FedEx People Development Coordinator Wendy Robinson laid a proper foundation for the admission of these documents under Rule 803(6). Dyno Construction, 198 F.3d at 575-576. Rodriguez's reliance on Michigan case

law finding certain police reports were inadmissable is misplaced. Legg, 286 F.3d at 289. Rodriguez's assertion that the documents were generated in anticipation of litigation is simply not supported by the record. It was for the jury to assign the appropriate evidentiary weight to the these documents. Properly viewed, the documents' probative value outweighed any unreasonable prejudicial effect on Rodriguez's claim. Williams, 18 Fed. Appx. at 345.

iv. Rodriguez' Resignation Letter

Rodriguez's argument that the admission of his redacted resignation letter affected a "substantial right" is conclusionary. Rodriguez's claim of constructive discharge was dismissed by this court, and the dismissal was affirmed on appeal. The limited redaction properly eliminated juror confusion and an implicit reinstatement of the dismissed constructive discharge claim. Rodriguez freely testified to his belief that he was subjected to unlawful discrimination throughout his tenure at FedEx. The court did not err in admitting a redacted copy of Rodriguez's resignation letter to the jury as probative of Rodriguez's remaining claim that he was denied a promotion to supervisor based on his Hispanic national origin. Williams, 18 Fed. Appx. at 344-345.

Rodriguez has failed to demonstrate that the court abused its discretion in the admission or exclusion of evidence at trial. Id. Any change in the evidentiary rulings challenged by Rodriguez would not have caused a different outcome in the verdict. Tompkin, 362 F.3d at 891. The rulings made by the court did not involve exceptional or extraordinary circumstances warranting relief under Rule 60(b)(6). Hopper, 867

F.2d at 294. Rodriguez did not move for a directed verdict under Rule 50(a) on the basis of the improper admission or exclusion of evidence, precluding relief under Rule 50(b) on similar grounds. Exxon Shipping, 128 S.Ct. at 2617 n.5. Rodriguez is not entitled to a mistrial in the absence of a reasonable probability that the verdict was improperly influenced by the erroneous admission or exclusion of evidence. Surles, 474 F.3d at 302. Rodriguez is not entitled to a new trial under Rule 59 based on an erroneous admission or exclusion of evidence. Tompkin, 362 F.3d at 891; Denhof, 494 F.3d at 543; Ridgway, 114 F.3d at 98.

C. Rodriguez's Proposed Jury Instructions

Rodriguez argues the court erred by failing to give his proposed jury instruction No. 1 relative to "mixed motive" cases, failing to give his proposed jury instruction No. 2. that "Discrimination based upon Plaintiff's Hispanic accent, [sic] includes discrimination based on national origin," and failing to give proposed jury instruction No. 6 directing the jury to find that Rodriguez was not required to apply for supervisor positions at all of the FedEx terminals over which Adkinson had control.

Whether to give a proposed jury instruction is within the district court's discretion. Hisrich v. Volvo Cars of North America, Inc., 226 F.3d 445, 449 (6th Cir. 2000). State law determines the substance of jury instructions in a diversity case, while federal procedural law governs issues regarding the propriety of the instructions. Id. A jury verdict should be reversed only if the jury instructions viewed as a whole were confusing, misleading, or prejudicial. Id. A district court sitting in diversity has no duty to give

additional requested instructions if the state's standard jury instructions given to the jury, viewed as a whole, fairly and accurately described applicable state law. Rhea v. Massey-Ferguson, Inc., 767 F.2d 266, 269 (6th Cir. 1985).

The state law claim before the jury was whether FedEx violated Michigan's ELCRA by denying Rodriguez a promotion to supervisor based on Rodriguez's national origin. The court instructed the jury using Michigan's standard civil jury instructions, including Michigan's definition of employment discrimination found at Michigan Model Civil Jury Instruction 105.02 (Jury Instruction No. 20), and the burden of proof to be applied in Michigan employment discrimination cases found at Michigan Model Civil Jury Instruction 105.04 (Jury Instruction No. 22):

Jury Instruction No. 20
Employment Discrimination – Definition

The plaintiff must prove that he was discriminated against because of his national origin.

The discrimination must have been intentional. It cannot have occurred by accident. Intentional discrimination means that one of the motives or reasons for plaintiff's failure to be promoted was his national origin. National origin does not have to be the only reason, or even the main reason, but it does have to be one of the reasons which made a difference in determining whether or not to promote the plaintiff.

* * *

Jury Instruction No. 22
Employment Discrimination (Disparate Treatment) – Burden of Proof

Plaintiff has the burden of proving that:

(a) defendant failed to promote the plaintiff; and

(b) national origin was one of the motives or reasons which made a difference in determining to fail to promote the plaintiff.

Your verdict will be for the plaintiff if you find that defendant failed to promote the plaintiff, and that national origin was one of the motives or reasons which made a difference in determining to fail to promote the plaintiff.

Your verdict will be for the defendant if you find that the defendant did not fail to promote the plaintiff. Your verdict will also be for the defendant if you find that defendant did fail to promote the plaintiff, but that national origin was not one of the motives or reasons which made a difference in determining to fail to promote the plaintiff.

Rodriguez's proposed jury instruction No. 1 does not fairly and accurately describe Michigan law in its attempt to shift the burden of proof to the employer FedEx:

PLAINTIFF'S PROPOSED SPECIAL INSTRUCTION No. 1

> Your verdict will be for Jose Rodriguez if you find that he demonstrated by a preponderance of the evidence that his Hispanic accent-national origin, was a motivating factor in FedEx's decision to not consider Rodriguez for a promotion to a supervisor position, even if other factors also motivated Adkinson's decision. However, if you find that FedEx's treatment of Rodriguez was motivated by both his Hispanic accent-national origin, and lawful reasons, you must decide whether he is entitled to damages. Plaintiff is entitled to damages, unless Fed Ex proves by a preponderance of the evidence that FedEx's [sic] would not have considered Plaintiff for a promotion even if Plaintiff's accent played no role in FedEx's decision. Remember that Plaintiff is not obligated to show that FedEx's legitimate reasons played no role in the decision to not consider Plaintiff for a promotion, nor does Plaintiff need to show that the prohibited factor was the sole principle [sic] reason or true reason.
>
> Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003); Barnes v. City of Detroit, 401 F.3d 729 (6th Cir. 2005).

(emphasis added). Desert Palace and Barnes were each federal Title VII cases out of, respectively, the District of Nevada and the Southern District of Ohio. Desert Palace, 539 U.S. at 96; Barnes, 401 F.3d at 733. Neither Desert Palace nor Barnes were diversity actions applying Michigan law. The Sixth Circuit has

recognized that Michigan has rejected the use of a "mixed-motive" burden shifting jury instruction:

> The Michigan Supreme Court Committee on Jury Instructions, in its drafting of [Michigan Standard Jury Instruction 2d § 105.04, now Michigan Model Civil Jury Instruction 105.04], considered and "deliberately eschewed" the McDonnell Douglas shifting-burdens formulation, stating specifically that such an instruction would "'add little to the juror's understanding of the case and, even worse, may lead jurors to abandon their own judgment and to seize upon poorly understood legalisms to decide the ultimate question of discrimination.' ..." II Michigan Standard Jury Instruction 2d, Employment Discrimination Introduction 17-5 (citing Loeb v. Textron, 600 F.2d 1003, 1016 (1st Cir. 1979)). We agree with the Committee on Jury Instructions. Rather than confuse the jurors with legal definitions of the burdens of proof, persuasion, and production and how they shift under McDonnell Douglas, we find that the above [Michigan standard jury] instruction was a clear and preferable statement of the law.

Lewis v. Sears, Roebuck & Co., 845 F.2d 624, 634 (6th Cir. 1988).

Even in Title VII "mixed-motive" cases, district courts are not required to give a "mixed-motive" instruction as proposed by Rodriguez:

> In order for an instruction to be proper under 42 U.S.C. § 2000e-2(m), a plaintiff need only

present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that "race, color, religion, sex, or national origin was a motivating factor for any employment practice." Desert Palace, Inc. v. Costa, 539 U.S. 90, 101-02, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003)(citing 42 U.S.C. § 2000e2(m)). In Desert Palace, the Court upheld a district court's decision to instruct the jury in a Title VII sex discrimination case, where the district court used the same language as the district court used in this case. Desert Palace, 539 U.S. at 96-97, 123 S.Ct. 2148, 156 L.Ed.2d 84.

A jury instruction will not automatically be erroneous simply because it does not precisely follow the legal niceties of McDonnell Douglas, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 and Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). See Brown v. Packaging Corp. of Am., 338 F.3d 586, 591 (6th Cir.2003); see also Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 571 (6th Cir.2003)(stating that criticism of an employee's performance, even if true, which is linked to stereotypes associated with a plaintiff's membership in a protected class is therefore squarely within the rubric of a mixed-motive analysis).

In this case, Barnes presented sufficient evidence for a reasonable jury to conclude that sex was a motivating factor for the City's employment decision. See § II.A.1, supra. A district court is not bound by the McDonnell Douglas analysis when giving jury instructions.

> Brown, 338 F.3d at 591. As the district court did in this case, courts may give mixed-motive jury instructions where the plaintiff has presented enough evidence for a reasonable jury to find by a preponderance of the evidence that sex was a motivating factor in the decision to demote plaintiff. Desert Palace, 539 U.S. at 96-97, 123 S.Ct. 2148, 156 L.Ed.2d 84. The district court instructed the jury using a mixed motive instruction that tracked the language in Desert Palace. After reviewing the mixed-motive instruction and the jury instructions as a whole, it is clear that the mixed-motive instruction was proper under Desert Palace. Accordingly, we cannot say that the instructions were confusing, misleading and prejudicial and we hold that the district court did not err by giving a mixed-motive instruction to the jury.

Barnes, 401 F.3d at 740 (emphasis added). In a recent case involving both Michigan ELCRA claims and age discrimination claims under the federal Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq., a panel of the Sixth Circuit explained:

> The direct/circumstantial distinction need not affect the further proceedings on remand. See Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 570-77 (6th Cir.2003) (en banc) (offering analysis under both direct-evidence and circumstantial-evidence standards and ultimately remanding age-discrimination case to the district court for further proceedings). Although a district court may find it helpful to instruct a jury on the McDonnell Douglas burden-switching framework in an appropriate

> circumstantial-evidence case, there is no requirement that it do so in all cases. See Brown v. Packaging Corp. of Am., 338 F.3d 586, 595-99 (6th Cir.2003); Chonich v. Wayne County Cmty. Coll., 874 F.2d 359, 366 (6th Cir.1989) (McDonnell Douglas instruction "has been approved but is not absolutely required by this court"). When a discrimination case proceeds to trial, the focus is on the ultimate question of discrimination, rather than the burden-switching framework, regardless of whether a plaintiff seeks to prove his case through direct evidence or circumstantial evidence. We noted as much by holding that when reviewing a jury verdict in a discrimination case, our "focus [is] on the ultimate question of discrimination rather than on whether a plaintiff made out a prima facie case." Tuttle v. Metro. Gov't of Nashville, 474 F.3d 307, 317 n. 7 (6th Cir.2007) (quoting Barnes v. City of Cincinnati, 401 F.3d 729, 736 (6th Cir.2005)). . . . .

Blair v. Henry Filters, Inc., 505 F.3d 517, 526 n.9 (6th Cir. 2007) (emphasis added). See also White v. Baxter Healthcare Corp., 533 F.3d 381 (6th Cir. 2008) (quoting Desert Palace, 539 U.S. at 101, and reasoning that in Title VII "mixed-motive" cases filed under 42 U.S.C. § 2000e-2(m), "[t]he only question that a court need ask in determining whether the plaintiff is entitled to submit his claim to a jury in such cases is whether the plaintiff has presented "sufficient evidence for a reasonable jury to conclude by a preponderance of the evidence that 'race, color, religion, sex, or national origin was a motivating factor

for'" the defendant's adverse employment decision.") (emphasis added).

Michigan law controlled the substance of the jury instructions to be given the jury in adjudicating Rodriguez's ELCRA claim of national origin discrimination. Hisrich, 226 F.3d at 449. The Michigan Model Civil Jury Instructions given to the jury regarding the definition of actionable national origin discrimination and Rodriguez's burden of proof fairly and accurately described Michigan law. Rhea, 767 F.2d at 269. Rodriguez's proposed jury instruction No. 1 does not accurately describe Michigan law, and would have "confuse[d] the jurors with legal definitions of the burdens of proof, persuasion, and production." Lewis, 845 F.2d at 634. The court did not abuse its discretion or otherwise err in refusing to give Rodriguez's proposed jury instruction No. 1. Hisrich, 226 F.3d at 449; Rhea, 767 F.2d at 269.

Rodriguez's remaining arguments that the court erred by failing to give his proposed jury instructions that discrimination based upon a Hispanic accent includes discrimination based on national origin, and by failing to give his proposed jury instruction that Rodriguez was not required to apply for supervisor positions at all of the FedEx terminals supervised by Adkinson, are without merit. Rodriguez was permitted to, and did, make these arguments to the jury as to the "ultimate issue" of discrimination. Blair, 505 F.3d at 526 n.9. Rodriguez has not shown that the jury instructions given, as a whole, were confusing, misleading, or prejudicial on this record. Hisrich, 226 F.3d at 449.

Rodriguez has failed to demonstrate that the court abused its discretion in refusing to give his proposed jury instructions. Id. Rodriguez is not entitled to relief under Rule 60(b)(6) premised on erroneous jury instructions. Hopper, 867 F.2d at 294. Rodriguez is not entitled to a mistrial or a new trial based on the instructions given to the jury. Surles, 474 F.3d at 302; Denhof, 494 F.3d at 543.

D. Asserted Defense Counsel Misconduct

Rodriguez argues that he is entitled to a new trial because defense Counsel denied in closing argument to the jury that Adkinson was a racist, and permitted FedEx witness Sammy Reid to "lie" as to when Reid first discovered that Rodriguez had filed a legal action. Whether misconduct at a trial was such that a fair or impartial verdict could not be reached is to be determined by the district court in its discretion. City of Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749, 756 (6th Cir. 1980). If there is a reasonable probability that counsel's questions or remarks raised unrelated subjects and improperly influenced the verdict, the verdict should be set aside. Id.

Defense Counsel's argument that Adkinson was not a racist is related to the subject of this lawsuit involving a claim that Adkinson, acting on discriminatory animus, refused to promote Rodriguez because of Rodriguez's Hispanic national origin. Defense Counsel was responding to Rodriguez's Counsel's broad closing and energetic argument. Rodriguez's assertion that Defense Counsel permitted Reid to "lie" is inflammatory and inaccurate. In any event, the jury was permitted to believe either Reid or Ravenelle regarding when Reid first learned that

Rodriguez was pursuing a legal claim. Rodriguez's arguments that defense Counsel engaged in misconduct which improperly influenced the verdict is baseless. There is no reasonable probability that defense Counsel improperly influenced the jury verdict. Kiewit Sons' Co., 624 F.2d at 756.

E. Sufficiency of the Evidence

Rodriguez argues the evidence introduced at trial does not support the verdict, and that the verdict is against the great weight of the evidence. Rodriguez points to what he terms "admissions" by Adkinson, and "lies" by Reid and Ravenelle. Rodriguez makes no citation to the record.

At best, Rodriguez's arguments are conclusionary. Rodriguez has not shown that exceptional or extraordinary circumstances related to the evidentiary record warrant relief from judgment under Rule 60(b)(6). Hopper, 867 F.2d at 294. Rodriguez did not move for judgment as a matter of law under Rule 50(a), and he is thus precluded from seeking judgment as a matter of law based on the sufficiency of evidence under Rule 50(b). Exxon Shipping, 128 S.Ct. at 2617 n.5. Alternatively, the motion is without merit as reasonable jurors could have drawn differing conclusions from the entirety of the record evidence. Brown, 342 F.3d at 626; Ridgway, 114 F.3d at 97. Rodriguez's assertions of admissions and lies do not support granting a mistrial. Suries, 474 F.3d at 302. When a motion for a new trial challenges the weight of the evidence, the trial court must accept the jury's verdict if, as here, the verdict reasonably could have been reached. Denhof, 494 F.3d at 543; Ridgway, 114 F.3d at 98. It was for the jury to consider the

credibility of the witnesses and the conflicting evidence, and their verdict could have reasonably been reached on this record notwithstanding Rodriguez's conclusionary assertions of "admissions" and "lies."

Consistent with the reasoning set forth above in this Section I, Rodriguez's motion for relief from judgment, judgment as a matter of law, a mistrial, or a new trial will be denied.

II. Defendant's Motion to Strike Remarks

FedEx moves to strike allegedly inappropriate and offensive remarks from Rodriguez's motion, particularly, an allegedly false representation that defense Counsel's website contained the Sixth Circuit's June 27, 2007 opinion In re Rodriguez, 487 F.3d 1001 (6th Cir. 2007), which remanded Rodriguez's failure to promote claim. Rodriguez has responded that Attorney Glotta "erroneously believed that the 6th Circuit decision shown to him by plaintiff's counsel Rick Martin, was located on defense counsel Laura Brodeur's website." Plaintiff's August 18, 2008 Response, at 1. The court noted the correction in considering Rodriguez's motion. Rodriguez's assertion that defense Counsel permitted Reid to "lie" was also considered by the court, and given its appropriate weight. The court declines to strike any remarks from Rodriguez's briefs in deference to a fully developed record.

III. Conclusion

For the reasons set forth above, Rodriguez's motion for relief from judgment, judgment as a matter of law, a mistrial, or a new trial, and request for an

evidentiary hearing, are hereby DENIED. FedEx's motion to strike is hereby DENIED.

SO ORDERED.

Dated: September 5, 2008

s/George Caram Steeh
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

[*Certificate of Service omitted in printing this appendix*]

* * *

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Bkrptcy No. 04-47510-PJS
Adversary No. 05-5149-PJS
HON. PHILLIP J. SHEFFERLY
Case No. 08-CV-10637
HON. GEORGE CARAM STEEH

[Filed June 27, 2008]

JOSE RODRIGUEZ,	)
	)
Plaintiff,	)
	)
vs.	)
	)
FEDEX FREIGHT EAST, INC.,	)
	)
Defendant.	)
	)

JUDGMENT FOR DEFENDANT
Jury Verdict

This action came before the court for a trial by jury. The issues have been duly tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that plaintiff take nothing, the action be dismissed on the merits, and the defendant recover of the plaintiff all applicable costs of this action.

Dated at Detroit, Michigan, June 27, 2008.

DAVID J. WEAVER
CLERK OF THE COURT

BY: s/Marcia Beauchemin
DEPUTY COURT CLERK

[*Certificate of Service omitted in printing this appendix*]

* * *

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-2272

[Filed January 5, 2011]

IN RE: JOSE ANTONIO RODRIGUEZ,

Debtor.

STUART GOLD, TRUSTEE FOR, THE ESTATE OF JOSE ANTONIO RODRIGUEZ,

Plaintiff-Appellant,

v.

FEDEX FREIGHT EAST, INC.,

Defendant-Appellee.

ORDER

BEFORE: BATCHELDER, Chief Judge; SUTTON and KETHLEDGE, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of

this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk